

No. 15485

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United States  
Court of Appeals  
for the Ninth Circuit

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UNITED STATES OF AMERICA,

Appellant,

vs.

BARNEY A. GERTZ, Owner of 3,827 Coins Being  
Likenesses of the 1847 "Hapa Haneri" Issued  
by the Hawaiian Government,

Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the District of Hawaii.

FILED

APR 22 1957

PAUL P. O'BRIEN, CLERK



No. 15485

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Court of Appeals**  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

**For the Libelant:**

LOUIS B. BLISSARD, ESQ.,  
United States Attorney,  
District of Hawaii; by  
CHARLES R. WICHMAN, ESQ.,  
Assistant United States Attorney.

**For the Respondent:**

LOUIS A. RODRIGUES, and  
PATRICK F. TUOHY,  
P. O. Box 48,  
Honolulu, Hawaii, by  
PATRICK F. TUOHY, ESQ.





In the United States District Court  
for the District of Hawaii

Civil No. 1474

UNITED STATES OF AMERICA,

Libelant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa  
Haneri" Issued by the Hawaiian Government,

Respondent.

**LIBEL OF INFORMATION**

To: The Honorable, the Presiding Judge of the  
United States District Court for the District  
of Hawaii:

The Libel of Information of the United States of America, by Louis B. Blissard, United States Attorney for the District of Hawaii, in a civil cause of forfeiture, for breach of the laws of the United States and, in particular, Title 18, United States Code, Sections 489 and 492, alleges upon information and belief as follows:

1. That on or about February 7, 1956, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Special Agent in Charge, Fred A. Irwin, United States Secret Service Field Force, seized as forfeited to the United States of America, for violation of Title 18, United States Code, Section 489, approximately

1,827 likenesses of the 1847 "Hapa Haneri" coin issued by the Hawaiian Government, and on February 29, 1946, approximately 2,000 additional such likenesses of the above-referred-to 1847 "Hapa Haneri" coin.

2. The said coins are now in the custody and possession of Fred A. Irwin, Special Agent in Charge of the United States Secret Service Field Force, Honolulu, Hawaii, and is in the City and County of Honolulu, and within the jurisdiction of this Court.

3. That on or about February 7 and 29, 1956, Barney A. Gertz did have in his possession with intent to sell, give away, and otherwise use same, without authority of the Secretary of the Treasury, or other proper officer of the United States, [3] tokens, disks and devices in the likenesses and similar in design and color and the inscription thereon of a coin of a foreign country issued as money under authority of said foreign government, to wit, likenesses of the 1847 "Hapa Haneri" coin issued as money by the Hawaiian Government, in violation of Section 489 of Title 18, United States Code.

4. By reason of the foregoing, the respondent coins became and are forfeited to the United States of America, under Title 18, United States Code, Section 492.

Wherefore, Libelant prays that due process issue in this behalf, as well as attachment to bring the respondent coins within the jurisdiction of this Court to enforce the forfeiture, and to give notice

to all persons concerned in interest, to appear and duly intervene herein by claim and plea to show cause why the forfeiture should not be decreed; and due proceedings being had thereon, Libelant further prays that this Court decree forfeiture to the United States of America of the respondent coins and their disposition pursuant to law.

Dated: Honolulu, T. H., this 28th day of March, 1956.

UNITED STATES  
OF AMERICA,  
Libelant;

LOUIS B. BLISSARD,  
United States Attorney, District of Hawaii, Its At-  
torney;

By /s/ CHARLES R. WICHMAN,  
Assistant U. S. Attorney.

[Endorsed]: Filed March 28, 1956. [4]

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Return on Service of Writ

United States of America,  
District of Hawaii—ss.

I hereby certify and return that I executed the annexed Warrant of Seizure and Monition on the therein-named 3,827 Coins, being likenesses of the 1847 "Hapa Haneri" issued by the Hawaiian Government, by attaching the said 3,827 Coins, personally at Room 324 Federal Building, Honolulu, T. H.,

at 1:30 o'clock p.m., on the 28th day of March, 1956, and by handing to and leaving a true and correct copy thereof with Barney A. Gertz personally at 1008 Kawaiahao Street, at Honolulu, T. H., in the said District at 2:50 p.m., on the 28th day of March, 1956.

THOMAS R. CLARK,  
United States Marshal;

By /s/ CHARLES A. GERLACH, JR.,  
Deputy. [5]

Public Notice of Attachment  
Office of the Marshal of the United States  
District of Hawaii

March 28th, 1956.

This 3,827 Coins, being likenesses of the 1847 "Hapa Haneri" issued by the Hawaiian Government having been attached by me and now being in my possession by virtue of a Libel of Information and Monition issued out of the District Court of the United States for the District of Hawaii.

Notice Is Hereby Given that any person removing or attempting to remove said 3,827 Coins, likenesses of the 1847 "Hapa Haneri," etc. without my written permission, or in any way interfering with said 3,827 Coins, likenesses of the 1847 "Hapa Haneri,"

etc. or my duly authorized Deputy or Keeper in charge thereof, Will Be Prosecuted to the Extent of the Law.

/s/ THOMAS R. CLARK,  
U. S. Marshal. [6]

## WARRANT OF SEIZURE AND MONITION

United States District Court for the  
District of Hawaii

To: The Marshal of the United States, District of  
Hawaii:

Whereas, on the 28th day of March, A.D. 1956, a Libel of Information was filed in the United States District Court for said District of Hawaii, by Louis B. Blissard, United States attorney for said District, on behalf of the United States, against 3,827 Coins, being likenesses of the 1847 "Hapa Haneri" issued by the Hawaiian Government, and praying that all persons including Barney A. Gertz, 1008 Kawaiahao Street, interested in said goods, wares and merchandise may be cited in general and special, to answer the premises; and due proceedings being had, that the said goods, wares and merchandise may, for the causes in said Libel of Information mentioned, be condemned as forfeited to the use of the United States.

You Are Therefore Hereby Commanded to attach the said goods, wares and merchandise, and to de-





In the United States District Court for  
the District of Hawaii  
Civil No. 1474

UNITED STATES OF AMERICA,

Libelant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa  
Haneri" Used by the Hawaiian Government,  
Respondent.

STIPULATION FOR EXTENSION OF TIME

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective attorneys, that the Respondent above named may have up to and including the 16th day of May, 1956, within which to answer or otherwise plead to the libel information herein.

Dated at Honolulu, T.H., this 16th day of April, 1956.

UNITED STATES ATTORNEY,

By /s/ CHARLES R. WICHMAN,  
Deputy U. S. Attorney.

LOUIS A. RODRIGUES, and  
PATRICK F. TUOHY,

By /s/ PATRICK F. TUOHY,  
Attorneys for Respondent.

Approved:

/s/ J. FRANK McLAUGHLIN,  
Judge of the Above-entitled  
Court.

[Endorsed]: Filed April 16, 1956. [9]

[Title of District Court and Cause.]

### MOTION TO DISMISS

Barney A. Gertz, owner of the respondent coins,  
moves the Court as follows:

1. To dismiss the action because the Libel of Information fails to state a claim against respondent coins upon which relief can be granted.

/s/ LOUIS A. RODRIGUES,

/s/ PATRICK F. TUOHY,

Attorneys for Owner of  
Respondent Coins. [11]

[Title of District Court and Cause.]

### CITATION OF AUTHORITIES

a. House Report (Judiciary Committee Report)  
No. 3042 51st Congress, First Session included in  
Volume 10, of House Reports.

b. U. S. vs. Roussopoulos—95 F. 977.

c. U. S. vs. Hopkins—26 F. 443.

d. U. S. vs. Gardner—9 L. ed. 556.

e. U. S. vs. Kuhl—85 F. 624.

f. U. S. vs. Barret—111 F. 369.

g. U. S. vs. Fitzgerald—11 F. 369, 91 F. 374.

h. Rule 12(b)—Fed. Rules of Civil [12] Procedure.



[Title of District Court and Cause.]

NOTICE OF HEARING

To: Louis A. Blissard, United States Attorney:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United States Courts & Post Office Building, Honolulu, Hawaii, on the 23rd day of May, 1956, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ LOUIS A. RODRIGUES,

/s/ PATRICK F. TUOHY,

Attorneys for Owner of  
Respondent Coins.

[Endorsed]: Filed May 15, 1956. [13]

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[Title of District Court and Cause.]

ANSWER

To: The Honorable, the Presiding Judge of the United States District Court for the District of Hawaii:

The answer of the claimant, Barney A. Gertz, to the libel herein, alleges:

1. Claimant denies the allegations of paragraph 1 of the libel.
2. Claimant admits the allegations of paragraph 2 of the libel.

3. Claimant denies the allegations of paragraph 3 of the libel.

4. Claimant denies the allegation of paragraph 4 of the libel.

#### First Defense

5. Further answering and as a separate defense, Claimant alleges as follows: That the coins now in the custody of Fred A. Irwin, are not such as to bring them within Section 489 of Title 18, United States Code.

Wherefore, Claimant prays that the libel herein be dismissed.

/s/ LOUIS A. RODRIGUES,

/s/ PATRICK F. TUOHY,

Attorneys for Claimant.

[Endorsed]: Filed May 31, 1956. [15]

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[Title of District Court and Cause.]

#### STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by the Libelant and Respondent:

(1) That on February 7, 1956, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Fred A. Irwin, Special Agent in Charge, U. S. Secret Service Field Force, seized as forfeited to the United States of America, in violation of Title 18, United States

Code, Section 489, approximately 1,827 tokens, disks and devices, and on February 29, 1956, he further seized approximately 2,000 additional identical tokens, disks and devices.

(2) That said coins are now in the custody and possession of Fred A. Irwin, Special Agent in Charge of the United States Secret Service Field Force, Honolulu, Hawaii, and is in the City and County of Honolulu, and within the jurisdiction of this Court.

(3) That on or about February 7 and 29, 1956, Barney A. Gertz did have in his possession with intent to sell, give away and otherwise use same, tokens, disks and devices, without authority of the Secretary of the Treasury, or other proper officer of the United States.

This leaves in issue the following facts:

(a) That the approximately 3,827 tokens, disks and devices are likenesses of the 1847 "Hapa Haneri" coin issued by the Hawaiian [17] Government.

(b) That the 1847 "Hapa Haneri" coin was issued as money by the Hawaiian Government.

Dated: Honolulu, T. H., this 6th day of August, 1956.

LOUIS B. BLISSARD,  
United States Attorney, District of Hawaii, At-  
torney for Libelant,

UNITED STATES  
OF AMERICA,By /s/ CHARLES R. WICHMAN,  
Assistant U. S. Attorney.LOUIS A. RODRIGUES,  
PATRICK F. TUOHY,  
Attorneys for Respondent;

By /s/ PATRICK F. TUOHY,

[Endorsed]: Filed August 8, 1956. [18]

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[Title of District Court and Cause.]

## DECISION

The United States of America as libelant filed a libel of information under the provisions of 18 USCA § 492 against 3,827 coins "being likenesses of the 1847 'Hapa Haneri' issued by the Hawaiian Government," the possession of which it was alleged violated 18 USCA § 489.<sup>1</sup> The libel prayed for for-

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<sup>1</sup>Section 489 reads:

"Whoever, within the United States, makes or brings therein from any foreign country, or possesses with intent to sell, give away, or in any other manner uses the same, except under authority of the Secretary of the Treasury or other proper officer of the United States, any token, disk, or device in the likeness or similitude as to design, color, or the inscription thereon of any of the coins of the United States or of any foreign country issued as money; either under the authority of the United States or under the authority of any foreign government shall be fined not more than \$100."

feiture of the coins and their disposition pursuant to law.

In February, 1956, a special agent of the United States Secret Service Field Force seized the respondent coins, claiming them forfeited in violation of the sections cited above. The coins were in the possession of Barney A. Gertz, who was responsible for their manufacture and who intended to sell them as souvenirs. The court accepted a stipulation that Gertz had no intention to defraud or cheat any prospective purchasers, although that is not an issue in the case.

Respondent coins resemble very closely the "Hapa Haneri" copper penny issued by the Kingdom of Hawaii in 1847. They were, in fact, so intended and so ordered, with certain slight variations, which are: a different metal is used in the respondent coins, and they are slightly thinner than the genuine coins; the facings on the respondent coins are reversed from the "Hapa Haneri," i.e., when turning the coins over, the [20] reverse side of the respondent coins will appear upside down; and on the respondent coins, in print so minute as to remain unseen without careful examination, are the words, "Souvenir Alii of Hawaii." The evidence is convincing that the respondent coins are likenesses or similitudes of the 1847 "Hapa Haneri."

The evidence showed that the "Hapa Haneri" coin was issued as money by the Kingdom of Hawaii in 1847. The 2nd Act of Kamehameha III, entitled "An Act to Organize the Executive Departments of



the Hawaiian Islands," enacted April 27, 1846, authorized the issuance of coins such as the "Hapa Haneri." The coins were minted the following year and placed in circulation as genuine money of the Kingdom.

Counsel for the respondent coins urged that the coins are not within the proscription of Section 489 because the Kingdom of Hawaii is not now a foreign government or country within the meaning of the statute, or to put it another way, that Section 489 may only be construed to apply to an "existing" foreign country or government. The Assistant United States Attorney contends on behalf of libellant that the statute is broad in its terms and that any coin "issued as money \* \* \* under the authority of any foreign government" necessarily includes the respondent coins.

The Court takes judicial notice of the following historical facts:

On October 8, 1840, the first Constitution of the Kingdom of Hawaii was proclaimed by King Kamehameha III. Following the lead of the United States of America, France and Great Britain in November, 1843, united in a joint declaration recognizing the independence of the Kingdom of Hawaii. Her status as a [21] sovereign nation continued until the annexation of the Republic of Hawaii to the United States of America by virtue of a Joint Resolution adopted on July 8, 1898. In April, 1900, Congress enacted the Hawaiian Organic Act, which established a territorial form of government in Hawaii,

a status which has remained unchanged since that date.

An early case, *United States vs. Arjona*, 120 U. S. 479 (1887), points up the need for and validity of laws of the United States which protect the integrity of money, notes or other securities issued by or under the authority of foreign sovereign governments. The rationale of that case, coupled with the definition of "foreign government" found in 18 USCA § 11,<sup>2</sup> led to the conclusion that respondent coins were not issued as money under the authority of a foreign government contrary to the provisions of Section 489.

Because of the chain of historical events summarized above, the Kingdom of Hawaii cannot possibly be considered as a "foreign government" in the year 1956. It no longer exists. After a long courtship,<sup>3</sup> the engagement was announced in 1898,

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<sup>2</sup>Section 11 reads:

"The term 'foreign government,' as used in this title, includes any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States."

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<sup>3</sup>Page 7, Revised Laws of Hawaii, 1935, Act 86, Session Laws of Hawaii, 1923, approved April 26, 1923 (part of Section 2):

"The annexation of Hawaii was first formally considered between the governments of Hawaii and of the United States in 1853-54.

"At that time President Pierce of the United States instructed Secretary of State Marcy to commission D. L. Gregg to represent the United States

followed by the wedding in 1900, which forever ended the existence of a proud and noble sovereign nation whose place in the nations of the world had been completely recognized by all other foreign governments up to the date of the final ceremony.

The libel of information is dismissed, and the respondent coins will be returned to their owner.

Dated at Honolulu, Hawaii, this 3rd day of October, 1956.

/s/ JON WIIG.

[Endorsed]: Filed October 3, 1956. [22]

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in Hawaii, to negotiate with Kamehameha III, king of Hawaii, for the annexation of Hawaii to the United States.

“The treaty was negotiated upon the basis of Hawaii coming into the Union as a State, ‘enjoying the same degree of sovereignty as other States, and admitted as such \* \* \* to all the rights, privileges, and immunities of a state, on a perfect equality with other states of the union.’

“(See records of the United States State Department and *Downes vs. Bidwell*, 182 United States Supreme Court Reports 244 at 305.)”



In the United States District Court for  
the District of Hawaii

Civil No. 1474

UNITED STATES OF AMERICA,

Libelant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa  
Haneri" Issued by the Hawaiian Government,

Respondent.

JUDGMENT AND ORDER RETURNING  
SEIZED PROPERTY TO OWNER

This cause came on for trial before the Court on September 14, 1956, upon the libel of information filed by the United States; the answer of claimant, Barney A. Gertz, and stipulation of facts filed August 8, 1956; the parties being represented by counsel;

Whereupon, the Court, after having heard the testimony and having weighed the evidence adduced in open court and the entire record, made its oral decision, finding that the respondent 3,827 coins were likenesses of the 1847 "Hapa Haneri" coins issued as money by the Hawaiian Government, and ordered the respondent coins forfeited; and

Thereafter, the Court, on its own motion for reconsideration, reconsidered its position, and a hear-

ing on the court's motion was had October 3, 1956, counsel for both parties being present;

Whereupon, the court, after hearing argument resisting the court's motion, by the United States Attorney's office, rendered its decision, finding:

That respondent coins are likenesses of the 1847 "Hapa Haneri" coin, which coin was issued as money under the authority of the Kingdom of Hawaii; but that the Kingdom of Hawaii, in the year 1956, cannot be considered a "foreign government" as that term is used in Title 18, United States Code, Section 489. Therefore, [25] respondent coins do not come within the provisions of Title 18, United States Code, Section 489.

Now, Therefore, It Is Ordered, Adjudged and Decreed that the libel of information is dismissed, and the respondent coins will be returned to their owner.

Dated at Honolulu, Hawaii, this 1st day of November, 1956.

/s/ JON WIIG,

United States District Judge.

[Endorsed]: Filed November 1, 1956. [26]

In the United States District Court for  
the District of Hawaii

Civil No. 1474

UNITED STATES OF AMERICA,

Libelant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa  
Haneri" Issued by the Hawaiian Government,

Respondent.

### NOTICE OF APPEAL

Notice is hereby given that the United States of America, Libelant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment and Order entered on November 1, 1956, in this action.

Dated: Honolulu, T. H., this 31st day of December, 1956.

LOUIS B. BLISSARD,  
United States Attorney, District of Hawaii, At-  
torney for Libelant,

By /s/ CHARLES R. WICHMAN,  
Assistant U. S. Attorney.

[Endorsed]: Filed December 31, 1956. [28]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
RECORD AND DOCKETING APPEAL

On application of the United States of America, Libelant above named, the Court being fully advised, It Is Ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the appeal taken by the United States of America by notice of appeal filed December 31, 1956, is extended to March 11, 1957, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated: Honolulu, T. H., this 6th day of February, 1957.

/s/ J. FRANK McLAUGHLIN,  
Judge, United States District Court for the District  
of Hawaii.

[Endorsed]: Filed February 6, 1957. [30]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
RECORD AND DOCKETING APPEAL

On application of the United States of America, Libelant above named, the Court being fully advised, It Is Ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the ap-

peal taken by the United States of America by notice of appeal filed December 31, 1956, is extended to March 31, 1957, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated: Honolulu, T. H., this 6th day of March, 1957.

/s/ J. FRANK McLAUGHLIN,  
Judge, United States District Court for the District  
of Hawaii.

[Endorsed]: Filed March 6, 1957. [34]

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[Title of District Court and Cause.]

ORAL RULING ON RESPONDENT'S  
MOTION TO DISMISS

Before: Hon. John Wiig, Judge.

May 23, 1956

I have permitted counsel to argue on this motion beyond the scope of the motion itself by making reference to evidentiary matters. However, they can have no influence on the Court in ruling on the motion because the only problem at the present time is whether or not taken on its face the libel of information states a claim upon which relief could be granted.

A careful examination of the libel, the allegations of the libel, shows that the likenesses of the hapa haneri were seized, forfeited to the United States

for a violation of section 489 of title 18 and that is the gist of the libel, coupled with the allegation that Barney Gertz had these coins in his possession in a manner in violation of section 489. [42]

The allegations of the information, if proved to be true, would be sufficient to authorize a forfeiture of the coins. But I have not yet received proof of the allegations contained in the information. The fact does appear, however—and could not be changed at the trial of this case—that the words “Souvenir, Alii of Hawaii” on the reverse side of the coins is in such fine print and indentation or raising—I can’t tell which—that it just is not observable to a person who would look at it in a casual or even in a rather careful manner. And the similarity to the original hapa haneri which—by the way, do counsel know what hapa haneri means?

Mr. Rodrigues: As far as we can determine, it is part of a dollar. We thought it was a half a dollar, but it is part.

The Court: It is half a hundred. And according to one source it should read hapa haneli because there was no “R” in the Hawaiian language at that time. I don’t know whether these were sent to the United States at that time for coining or what happened in the spelling, but it is not unusual that the “R” is used for the “L” or that the “R” was used where the “L” should have been.

The motion to dismiss the information is denied and the respondent will have one week within which to file a pleading in accordance with the rules of civil procedure.



March 13, 1957.

/s/ ALBERT GRAIN,  
Official Court Reporter.

[Endorsed]: Filed March 13, 1957. [43]

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In the United States District Court for  
the District of Hawaii

Civil No. 1474

UNITED STATES OF AMERICA,

Libelant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa  
Haneri" Issued by the Hawaiian Government,

Respondent.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S.  
District Court, Honolulu, T. H., on September 14,  
1956, commencing at 10:00 o'clock a.m.,

Before: Hon. Jon Wiig, Judge.

Appearances:

CHARLES R. WICHMAN,  
Assistant United States Attorney,  
Appearing for Libelant.

PATRICK F. TUOHY, ESQ.,  
Appearing for Respondent.

September 14, 1956, 10:00 A.M.

(Case called.)

Mr. Wichman: Ready for the libelant.

Mr. Tuohy: Ready for the respondent. Before we get started, your Honor, I would like to state that we have entered into a stipulation with the government on the facts in this case. However, I should like to make our position clear in that we do not stipulate that Hawaii is such a foreign government as comes under the section of the Title 18 of the Criminal Code.

The Court: I read the stipulation, and it was not too clear in my mind whether you had agreed to that. But you want to make your position clear that you have not so stipulated?

Mr. Tuohy: Yes, sir.

The Court: Mr. Wichman, is that your understanding?

Mr. Wichman: That is my understanding of the stipulation, your Honor. However, it is also my understanding that that was an issue before the Court in the motion to dismiss and the Court ruled that it was such a coin as came within the provisions of that statute on the motion to dismiss.

Mr. Tuohy: Your Honor, I don't believe that was the Court's ruling at all in the motion to dismiss. The ruling on the motion to dismiss was that the indictment was sufficient to—the facts set forth in the indictment were sufficient [2\*] to proceed fur-

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.



ther in this matter. There was no determination by the Court as to the status of Hawaii being a foreign government.

The Court: I don't recall, Mr. Wichman, that I made a finding to that effect.

Mr. Wichman: Well, as to the matters of law the Court ruled, put it that way.

The Court: Well, I can rule on a matter of law on matters of which I can take judicial notice at the time.

Mr. Wichman: In other words, the ruling of the Court was that the libel of information stated a good cause of action if we were able to prove the facts contained within the libel.

The Court: Well, the motion to dismiss is the equivalent of a demurrer, and I went on that assumption for the purposes of the motion to dismiss.

Mr. Wichman: And as I recall, your Honor, that was specifically a question which we argued to the Court, as to whether they came within the provisions of Section 489 of Title 18.

Mr. Tuohy: If the Court please, I believe at that time when we argued on the issue of foreign country you did not rule, and that instead you treated the motion to dismiss as a demurrer and ruled that the motion to dismiss was not proper since the allegations set forth in the libel of information [3] were sufficient to sustain it, but you did not rule on all of the facts set forth in the libel. I don't think that is the purpose of the ruling on the motion to dismiss.

The Court: I don't think it was necessary for me to rule as to a matter of law. I held that the libel of

information stated a cause of action against the respondent. That is my recollection of it. Are you ready to proceed?

Mr. Wichman: Ready for the government.

The Court: Very well.

Mr. Wichman: I would like to call as my first witness Mr. Chang.

### EUGENE CHANG

called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Wichman:

Q. State your name, please?

A. Eugene Chang.

Q. And where are you employed?

A. Employed by the Territorial Public Archives.

Q. I am sorry. I can't hear you.

A. By the Territorial Public Archives.

Q. And are you appearing in response to a subpoena directed to Agnes C. Conrad, Archivist of the Public Archives?      A. Yes, sir. [4]

Q. And you were designated by her to appear?

A. Yes, sir.

Q. And did you bring the items requested in the subpoena, the 2nd Act of Kamehameha III, entitled "Act to Organize the Executive Departments of the Hawaiian Islands," enacted 27 April, 1846?

A. Yes, sir.

Q. Have you got that volume there?

(Testimony of Eugene Chang.)

A. Yes, sir.

Q. And this volume is part of the records of the Public Archives, Territory of Hawaii?

A. Yes, sir.

The Court: The Archives is the public depository of official documents of the Territory of Hawaii?

The Witness: That is right, your Honor.

Mr. Wichman: Your Honor, I would like to call the Court's attention to the 2nd Act of Kamehameha III to which we have just referred, Chapter 4 of part 3, Sections 1 and 2, which we ask the Court to take judicial notice of.

Mr. Tuohy: Your Honor, at this time I would like to object to Mr. Wichman's motion, for this statute or law of the Hawaiian Government is a foreign law in that it was enacted prior to the annexation of the Territory by the United States, and as such is not subject to judicial notice.

The Court: How long are these sections? [5]

Mr. Wichman: The sections are, oh, roughly they take up two-thirds of one page.

The Court: I suggest you read them into the record.

Mr. Wichman: In the alternative, we would offer them in evidence as an official record kept in the Archives. However, we feel that the Court can take judicial notice of the records of the Hawaiian Government, whose successor is, first, the Republic of Hawaii and subsequently the Territory of Hawaii, and whose laws were, by the Organic Act, continued in force, with certain exceptions.

(Testimony of Eugene Chang.)

Mr. Tuohy: May I have a ruling on my objection, your Honor?

The Court: Well, are you now asking me to take judicial notice or are you offering the sections in evidence? The reason I make that suggestion is that that is a very voluminous book, and in order to have it preserved, it should go back to the Archives immediately. And for the purpose of the record, the sections should be in the record.

Mr. Wichman: Well, may I offer it? May I first read it to the Court and ask, first, that the Court take judicial notice of it, but in order to allow the custodian to take it back to the Archives, read the statements that it contains into the record?

The Court: Yes; you may.

Mr. Wichman: From a volume in which is contained [6] the 2nd Act of Kamehameha III, entitled "An Act to Organize the Executive Departments of the Hawaiian Islands," enacted into law 27th day of April, A. D. 1846, signed Kamehameha III, attested John Young, Premier, Chapter 4 of Part 3 entitled, "Of Coins and Currency," Section 1.

"The currency of the Hawaiian Islands shall consist of the dollar, valuing 100 cents. American currency; the half dollar, valuing 50 cents; the quarter dollar, valuing 25 cents; eighth of a dollar valuing twelve and a half cents; and sixteenth of a dollar, valuing six and a quarter cents; a copper coin impressed with the head of His Majesty, surrounded by the words 'Kamehameha III, ka moi'; on the reverse, 'Apuni Hawaii.' Gold and silver coins wear-

(Testimony of Eugene Chang.)

ing the legalized impress of any sovereign states, shall be receivable in payment of dues, duties and taxes, at the exchequer, and in tender or payment of debts contracted by private individuals in this kingdom, at their current or merchantable value, for the time being, at Honolulu, to be established by evidence. In case any of the said coins be refused, the payer having tendered, may bring the same into court, and plead such tender and refusal as a bar of costs as prescribed in the Act to Organize the Executive.

“Section 2. The minister of finance shall cause to be minted for circulation the copper coin as described in the preceding section; and with the advice of two-thirds of the [7] privy council, in approbation of His Majesty, he may also cause to be minted any small silver coins of such descriptions and quantity as said council shall direct.”

We offer the following sections read into the record, your Honor, or we ask the Court to take judicial notice of those, as being the law of the Hawaiian Kingdom, which is the predecessor of the present Territory of Hawaii.

Mr. Tuohy: Your Honor, again I renew my objection that the law is a foreign law in that it was enacted prior to any annexation by the United States and as such is not subject to judicial notice. I think it is clear that the holding is that foreign laws are not the subject of judicial notice.

The Court: I am going to overrule your objec-



(Testimony of Eugene Chang.)

tion. I not only take judicial notice of it, but I will receive it in evidence so there is no question about it, the sections just read by Mr. Wichman from the Act of April 27, 1946.

Mr. Wichman: And may we ask, your Honor, that the volume of the laws containing the sections, Act of Kamehameha III be returned to the custodian for return to the Archives of the Territory of Hawaii?

The Court: Unless Mr. Tuohy has some objection.

Mr. Tuohy: Your Honor, I have no objection to this being returned to the Archives. However, I should like your Honor to reconsider the fact that this is merely a copy of it, not even a certified copy of what the law was at that time. [8] There is no showing that this is an authentic document. The mere fact that it is in a book does not prove the law. This is not a rare book. There are four or five copies over at the Supreme Court. It is not peculiar.

The Court: May I see the volume, please?

The Witness: Your Honor, I think the first of the book is in Hawaiian.

The Court: Yes. I am quite aware of it. I have had considerable experience with the session laws of Hawaii. I am satisfied that, from examination of the volume produced by the witness, it is one of the original copies of the laws as passed through the hands of very distinguished members of this bar who are not alive any more.

(Testimony of Eugene Chang.)

Mr. Tuohy: It is my understanding, then, your Honor, you do not consider it a foreign law?

The Court: It is in evidence. It isn't a question of what I consider it as, Mr. Tuohy. Your objection is overruled.

Q. (By Mr. Wichman): Now, Mr. Chang, did you bring with you in response to the subpoena duces tecum Volume 3, No. 12, of date August 8, 1946, of the Polynesian Magazine from your records? A. Yes, sir.

Mr. Wichman: Your Honor, I would like to read into the record a portion of Volume 3, No. 12, dated August 8, 1846, [9] of The Polynesian.

Mr. Tuohy: If your Honor please, I object to any testimony coming in as to what is contained in this on the ground that it is a copy of a foreign document, and as such it is provided in the Rules as to the procedure in admitting it in court, citing in particular Section 1741 of Title 28, United States Code, which reads as follows:

“A copy of any foreign document of record or on file in a public office of a foreign country or political subdivision thereof, certified by the lawful custodian thereof, shall be admissible in evidence when authenticated by a certificate of a consular officer of the United States resident in such foreign country, under the seal of his office, that the copy has been certified by the lawful custodian.”

The Court: That is the ground of your objection?

Mr. Tuohy: Yes.

(Testimony of Eugene Chang.)

The Court: The objection is overruled.

Mr. Wichman: That portion of volume 3, No. 12 of *The Polynesian* entitled, "Report of the minister of finance read before His Majesty to the Hawaii Legislature, August 1, 1846," the second to last paragraph of that report, which reads as follows:

"The copper coin authorized by the Legislature at the [10] last session has been ordered, and will afford great facility in small business transactions."

We offer, first, that excerpt from *The Polynesian* into evidence and also ask the Court to take judicial notice of it as coming from a document in the official records of the Public Archives of the Territory of Hawaii, and the fact that *The Polynesian* was the official journal of the Hawaiian Government, published weekly at Honolulu, Oahu, Hawaiian Islands.

The Court: The excerpt will be received in evidence.

Q. (By Mr. Wichman): And did you bring with you, Mr. Chang, Volume 3, No. 52, of date May 15, 1847, of *The Polynesian*?

A. Yes, sir. I think it is in that volume.

Q. In the same volume? A. Yes.

Mr. Wichman: May I read into the record at this time, your Honor, from *The Polynesian* of date Saturday, May 15, 1847, being Volume 3, No. 52, from page 212 the following—withdraw that—from page 211, the following excerpt, under the caption, "By authority, Department of Finance, Honolulu, Hawaii, May 10, 1847":

"Pursuant to the provisions of Chapter 4, Part 3,



(Testimony of Eugene Chang.)

of the Act to Organize the Executive Departments, the undersigned has 'caused to be minted for circulation a copper coin as described in the first section of [11] that chapter,' which he has put into circulation as therein prescribed to the extent of an issue of \$1,000.

"Said coin will be accordingly henceforth received throughout this kingdom and at this department 'in payment of government dues, duties and taxes, and in tender or payment of debts contracted by private individuals' at the value of 100 of said coins to the dollar. G. P. Judd, Minister of Finance."

We offer that excerpt from *The Polynesian* of Saturday, May 15, 1847, into evidence and ask the Court to take judicial notice of that publication.

Mr. Tuohy: Your Honor, I object on the ground of hearsay and materiality, and the same objection as to the other, that it is a foreign document and has not been proven.

The Court: Objection overruled. The excerpt will be received in evidence.

Q. (By Mr. Wichman): Did you, Mr. Chang, bring with you Volume 4, No. 2, of date May 29, 1947, of *The Polynesian*? A. Yes, sir.

Mr. Wichman: I am reading into the record from *The Polynesian* of date Saturday, May 29, 1847, Volume 4, No. 2, under the caption, "A report of the Minister of Finance to the Nobles and Representatives of the Hawaiian Islands in Legislative Council Assembled." The 19th paragraph thereof reads as follows: [12]

(Testimony of Eugene Chang.)

“The copper coin to which I referred in my last Report has been manufactured and is expected daily. Owing to the recent large exportation of specie to California and China, the circulating medium was at one time much reduced; but importation of specie have taken place and it is to be hoped that currency will be equal to the wants of commerce.”

Signed G. P. Judd, Minister of Finance, Honolulu, April 28, 1847.

We offer that excerpt into evidence and also ask the Court to take judicial notice of it.

Mr. Tuohy: Same objection.

The Court: The same ruling. The excerpt will be received in evidence.

Mr. Wichman: I have no further questions for the witness.

The Court: Cross-examine.

Mr. Tuohy: No questions, your Honor.

Mr. Wichman: For the record, may the witness be allowed to take back to the Archives with him the volumes he brought with him this morning?

The Court: Yes. You are excused. Thank [13] you.

MRS. CLARENCE HOHU

called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wichman:

Q. State your name, please?

A. Mrs. Clarence Hohu.

Q. And where are you employed, Mrs. Hohu?

A. At the Bishop Museum.

Q. And have you appeared today in response to a subpoena addressed to Dr. Alexander Spoehr, Director of the Bishop Museum?

A. Yes.

Q. And were you designated by him to appear on his behalf?

A. Yes.

Q. Did you bring with you the copper coins bearing on their face the image of Kamehameha III and the words "Kamehameha III, Ka Moi" and on the reverse side a wreath enclosing the words, "Hapa Haneri"?

A. I did, sir.

Q. And have you those with you?

A. Yes; I do.

Q. How many such coins did you bring with you?

A. Eight. [14]

Q. Eight coins?

A. Yes.

Q. And you are handing me a list. What does this list represent?

A. A list of the coins and by whom they were—and who presented them to the Museum and when.

Q. And are the coins separated in any way?

A. Yes; they are.

(Testimony of Mrs. Clarence Hohu.)

Q. How are they separated?

A. In envelopes.

Q. And the reason for that is what?

A. I suppose to keep them intact as separate units.

Q. So you can identify the coin that was given by any particular person, is that right?

A. Yes; that is right.

Mr. Wichman: May I have the paper marked for identification, your Honor, that was handed to me by the witness?

The Court: Yes. It will be marked Exhibit 1.

The Clerk: Exhibit 1 for identification.

The Court: Exhibit 1 for identification.

(The instrument referred to was marked as Exhibit No. 1 for identification.)

Q. (By Mr. Wichman): Reading from Plaintiff's Exhibit 1 for identification, Mrs. Hohu, would you produce the coins listed as No. 9710 presented by Dr. William T. Brigham on [15] March 15, 1910? A. Here.

Mr. Tuohy: If the Court please, to save a little time, we are willing to stipulate that the various coins were presented to the Bishop Museum by the people as set forth in that list.

Mr. Wichman: Well, may I offer the list into evidence, then, on that basis?

The Court: And the coins?

Mr. Wichman: And we also—I anticipate I may have some objection to the introduction of the coins.

(Testimony of Mrs. Clarence Hohu.)

I don't know. But I will offer them as a separate exhibit and request the Court to allow us to withdraw them and submit a photograph, which we had taken this morning of the coins, into evidence in their place so that they may be returned to the Bishop Museum.

Mr. Tuohy: May we have the purpose for which the coins are offered in evidence, your Honor?

The Court: I assume that they are offered by the government for the purpose of helping to prove their case.

Mr. Tuohy: Well, in that event, your Honor, I object to the admission of the coins. There is no foundation laid that they are true and genuine coins of 1846 Hapa Haneri.

Mr. Wichman: If I may be heard as to that, your Honor.

The Court: Yes. [16]

Mr. Wichman: In connection with that, the Revised Laws of Hawaii make the Bishop Museum an official repository for items such as this in the Territory, and as such an item coming from an official repository, such as the Bishop Museum, lends authenticity to the coins. They were held by the Bishop Museum as Hapa Haneri coins issued, and as such we offer them in evidence, coming from an official repository and being similar to the description in the official document coming from the Public Archives of the Territory of Hawaii. I have in mind the statute——



(Testimony of Mrs. Clarence Hohu.)

The Court: I am aware of that statute, Mr. Wichman.

Mr. Tuohy: Your Honor, I object. There is no showing that these are supposedly authentic originals of the Hapa Haneri. The mere fact that they come from the official repository doesn't make them official. And I am sure your Honor is aware that many items contained in the Bishop Museum are not originals. They have replicas of items. There has been no showing here that these are original coins.

The Court: Of course, you appreciate the fact that it would be impossible at this date to have somebody come in and testify that these came from the mint.

Mr. Tuohy: I appreciate that, your Honor, but if we could have at least an expert witness. Mrs. Hohu here is not qualified as an expert witness. I object to the government establishing its case by strictly hearsay. It has been nothing [17] but hearsay all along.

The Court: Do you wish to examine Mrs. Hohu on voir dire?

Mr. Tuohy: If he wishes to present her as an expert witness.

The Court: Well, the only question before the Court is that they have been offered in evidence and you have made your objection and I am giving you an opportunity, on the basis of your objection, to examine on voir dire, if you desire.

(Testimony of Mrs. Clarence Hohu.)

Mr. Tuohy: Mrs. Hohu, are you an expert on Hawaiian coins?

The Witness: No; I am not.

The Court: The coins you brought in here this morning are from the Bishop Museum, and you brought them pursuant to the subpoena directed to Dr. Spoehr?

The Witness: That is correct; yes, sir.

The Court: The objection is overruled. How many envelopes do you have there, Mrs. Hohu?

The Witness: Four within a container.

The Court: Are there two coins in each envelope, or do they vary?

Mr. Tuohy: No. I think it is a combination of 2, 3, 1, 1.

The Court: Very well, the first, the list of donors will be received as Exhibit 1, the envelope containing three [18] coins will be received as Exhibit 2, the one containing two coins as Exhibit 3, and the other two as Exhibits 4 and 5.

The Witness: It is two, three, one, one, one.

The Court: Then another one, Exhibit 6.

(The instruments referred to were marked Exhibits 1, 2, 3, 4, 5 and 6 in evidence.)

Mr. Wichman: I have no further questions for the witness.

The Court: Cross-examine.



(Testimony of Mrs. Clarence Hohu.)

Cross-Examination

By Mr. Tuohy:

Q. Mrs. Hohu, have you seen these coins before at the Museum?

A. Only on exhibition in the Museum.

Q. Do you have any idea of your own as to whether they are original Hapa Haneris?

A. I am afraid not.

Q. You don't know?

A. No; I don't. I wish I were living at the time.

Q. And the only thing that you know with relation to those coins is that the coins in the various envelopes were donated to the Museum by the people on that list?

A. That is right.

Mr. Tuohy: No further questions.

Mr. Wichman: No questions. [19]

The Court: Mrs. Hohu, those coins will be kept in their envelopes and separated as you have them now, and they will be kept in the custody of the clerk of this Court until they are returned to you in the same condition that you brought them here this morning. Thank you. You are excused.

Mr. Wichman: Mr. Bauer.

H. E. BAUER

called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wichman:

Q. Would you state your name, please?

A. H. E. Bauer.

Q. Mr. Bauer, how long have you been a resident of the Territory of Hawaii? A. Since 1941.

Q. What is your present occupation?

A. Stamp and coin dealer.

Q. Stamp and coin dealer? A. Yes, sir.

Q. How long have you been a stamp and coin dealer? A. Since '49.

Q. And are you also a collector of coins?

A. I have been all my life, stamps and coins.

Q. Mr. Bauer, how long have you been familiar with [20] Hawaiian coins?

A. Well, I got interested in '41 when I came over here, and studied up on that and bought a few at that time.

Q. Do you know or are you familiar with a coin known as the Hapa Haneri? A. Yes, sir.

Q. How long have you been familiar with that coin A. Well, just since that time.

Q. Since what time? A. About '42 or so.

Q. Since about 1942? A. Yes.

Q. So that you have been familiar with those coins since '42 and have been a dealer in coins and stamps since 19—— A. '49.

(Testimony of H. E. Bauer.)

Q. '49. Do you belong to any coin societies in the Territory of Hawaii?

A. No. The only one was established about a year ago and I did not join.

Q. You did not join that? A. No.

Q. Isn't it true you told me that—when I was talking to you yesterday or the day before, that you were a non-joiner of organizations?

A. I am a no joiner. I don't belong to any organizations. [21]

Q. You don't belong to any organizations?

A. No.

Q. Mr. Bauer, have you given any scientific talks on coins?

A. Well, I wouldn't call them exactly scientific. I gave talks on coins to several YMCA meetings when I was invited to do so.

Q. You were invited to give talks to them?

A. Yes, about three or four, I think, the last few years.

Q. And have you given talks on Hawaiian coins in particular?

A. Yes, they were mentioned quite often.

Q. And have those talks covered the Hapa Haneri coin?

A. Yes. In fact, I took Hawaiian coins along and showed them to the listeners.

Q. Do you have any coins known as Hapa Haneri coins in your possession? A. Yes.

Q. Have any of those coins passed through your

(Testimony of H. E. Bauer.)

hands as a business man dealing in coins and stamps since 1949?

A. Oh, many of them. At one time I sold 400 Hapa Haneris to one man.

Q. I beg your pardon?

A. At one time I sold 400 Hapa Haneris to one man.

Q. In one sale? [22]                      A. In one sale.

Q. During the course of your collecting and dealing in coins, how many, would you say, how many Hapa Haneri coins have passed through your hands?

A. Oh, I couldn't say; about six or seven hundred.

Q. Have you or do you write any papers or articles on coins, and in particular, Hawaiian coins?

A. Yes. I contribute a weekly coin column to the Star-Bulletin.

Q. How long have you been doing that?

A. Since '49.

Q. How many dealers in coins are there in the City of Honolulu here?

A. Well, many of them dabble in coins, you know. But real coin dealers, I think, are—oh, I would say two besides me.

Q. Two besides you, so three altogether?

A. Let's make it three more. About four altogether.

Q. Mr. Bauer, have you ever been called by any organization to consult on the value or authenticity of Hawaiian coins?

(Testimony of H. E. Bauer.)

A. The Bishop Museum occasionally calls me up and asks for values of Hawaiian coins that were donated to them. And I don't think organizations, but private people I get practically every day inquiries about value of coins, you know. [23]

Q. To have coins appraised by you?

A. Yes.

Q. And have you done any appraisal work for the courts? A. No.

Q. You have not done any appraisal work for the courts?

A. No, because I am a no joiner, I don't apply for the thing at all.

Q. As a prerequisite to determining the value of a coin, must you also determine its authenticity?

A. Yes.

Q. And you have been consulted in such matters by the Bishop Museum, is that correct?

A. Yes.

Q. Have you had any other dealings with Hawaiian coins about which I have not asked you that gives you some further background in connection with your knowledge of Hawaiian coins?

A. Well, having a store, I naturally have many collectors coming in, many mainland collectors and some very good experts, and in conversation with them we discuss quite often Hawaiian coins, because they are getting very popular now on the mainland.

Q. So you have entered into conversations with other collectors with regard to Hawaiian coins?



(Testimony of H. E. Bauer.)

A. Yes.

Q. Have you sold any Hapa Haneri coins? [24]

A. Yes. I just told you, 400 in one sale, and many, many others, because for awhile all dealers here offered complete sets of Hawaiian coins from the dollar down to the penny, and I sold at that time quite a few, at least one a week, you know. But the penny is getting now rather scarce and so our sets usually consist only of the silver coins of 1883.

Q. Mr. Bauer, when you sell coins, Hapa Haneri coins, have you sold them as genuine originals as opposed to copies?

A. Well, naturally, as far as I know, I only sell originals. I have seen—not on Hapa Haneri, but other coins—fakes, which I do not sell, the same as stamps, I refuse to sell. But when I sell a coin or stamp, I am convinced it is genuine, and I have a long experience, as I have been a collector.

Q. So that these coins that you say you have—Hapa Haneri coins that you have sold, you have made a determination that they were genuine originals and sold them as such, is that correct?

A. Yes, I was of the—convinced that they were originals.

Mr. Wichman: Your Honor, we offer Mr. Bauer as an expert in the field of Hawaiian coins and particularly with regard to the Hapa Haneri coins.

Mr. Tuohy: Your Honor, I would like to be permitted to question Mr. Bauer. [25]

The Court: You may, Mr. Tuohy.

(Testimony of H. E. Bauer.)

Voir Dire Examination

By Mr. Tuohy:

Q. Mr. Bauer, you stated that any coin that you sold, it was your belief and conviction that it was a genuine coin? A. My belief, yes.

Q. Now, in regards to a Hapa Haneri, how would you arrive as to the authenticity of a coin of that denomination?

A. Well, it can only be established by the coins we had in our possession, naturally, taken for granted that they were genuine. But that doesn't state that the thing cannot be faked, or hasn't been faked. Many coins, many stamps, have been faked a short time after they came out, so that an 1847 coin, I couldn't swear that there was nobody here on the island or on the mainland who made a replica of that, you know. But in most cases, coins, the genuine coin can be told by the sharpness of the die, which usually fakers do not get, and in most cases they also fall down on some little detail which the experts usually detect. So I am under the conviction that all coins, all Hapa Haneris I sold were genuine. But, as I say, whether they were faked a short time after they came out, that I could not tell.

Q. In other words, you have no way of knowing whether or not every Hapa Haneri coin that passed through your hands was genuine or not? [26]

A. Well, I am of the conviction that my coins I sold were genuine.



(Testimony of H. E. Bauer.)

Q. That is only based on the fact that——

A. But then Rembrandt's paintings were sold as genuine and after many years it was discovered that somebody else painted them, you know.

Q. The question I want answered, Mr. Bauer, is that you could be wrong in saying that, you could be wrong as to the authenticity of any Hapa Haneri coin that passed through your hands so far, couldn't you; isn't that possible?

A. Well, that is possible.

Q. And in your experience as a coin collector and a coin dealer, isn't it usual on coins that are in current use, or nearly current—in other words, just go out of circulation, aren't there a set of standards set up for that particular coin as to the weight of the coin, the metal content of the coin?

A. Oh, yes. And that we—by that we can usually tell the genuine coin from the other one, because it is different in weight and different metal.

Q. Now, was there any standard that you know of set up for the Hapa Haneri?

A. I do not know the weight, but I think if I can get a Hapa Haneri and a fake, I could tell.

Q. But you wouldn't know how much the original weight was? [27]

A. No, I do not know.

Q. There is no set of standards available?

A. Well, I guess somebody weighed them, the original. There is very little official information obtainable, you know, about the original coinage. But I suppose somebody has weighed it. But I

(Testimony of H. E. Bauer.)

couldn't tell you how heavy it is. I suppose it is about as heavy as the United States large cents which were in use up to 1854. And I suppose the Hapa Haneri is about the same weight.

Q. Were you approached by Mr. Wichman here to testify in this case?

A. Yes. He came to my store day before yesterday and asked me what I know about Hawaiian coins, whether I would qualify as an expert and so on. And I showed him the one Hapa Haneri I have.

Mr. Tuohy: No further questions, your Honor.

The Court: Yes. I have another matter on at 11 o'clock. I don't think it will take long. I will continue this case until 5 minutes after 11:00, at which time I will rule on the qualifications of the witness. The court will stand at recess.

(Recess.)

The Court: Mr. Wichman, do you have any additional questions you wish to ask concerning Mr. Bauer's qualifications as an expert? [28]

Mr. Wichman: None concerning his qualifications as an expert.

The Court: Mr. Bauer, do you have any reason to believe that the Hapa Haneri which have passed through your hands were not authentic?

The Witness: No. I think they were.

The Court: You applied the same standards in determining that as you did in determining the authenticity of other coins?

(Testimony of H. E. Bauer.)

The Witness: Yes, sir.

The Court: I find the witness qualified as an expert.

Mr. Tuohy: May I enter an objection to the Court's ruling at this time?

The Court: Yes. The objection is overruled. I will ask counsel to handle those inner envelopes with care so that they are not intermingled or mixed up.

Mr. Wichman: May I have a moment to arrange these, your Honor?

The Court: Yes.

### Direct Examination

(Continued)

By Mr. Wichman:

Q. Mr. Bauer, I show you Exhibit 2 in evidence and ask you to inspect those coins? A. Yes.

Q. In your opinion, Mr. Bauer, are those [29] genuine Hapa Haneri coins?

A. Yes. To my best knowledge they are genuine Hapa Haneris.

Q. I beg your pardon? A. Yes.

Q. Mr. Bauer, a coin, a genuine Hapa Haneri such as you just testified Exhibit 2 was, what would be the value at the present time?

A. At the present time the market is about \$5, and those are in fine condition, those that you showed me.

Q. Those in Exhibit 2 are in fine condition?

A. Fine condition. They are not perfect because

(Testimony of H. E. Bauer.)

they are scratched. They have been cleaned, because many of them have been corroded. They were corroded and people tried to get that off. They cleaned it, and that—the coin shows that.

Q. I show you Exhibit 3 and ask you as to whether you are able to determine the authenticity of those coins?

A. Yes, I believe them to be genuine.

Q. In your opinion those are genuine coins?

A. Yes.

Q. And I ask you the same question in connection with Exhibit 4.

A. Yes, the same here.

Q. And the same question in connection with Exhibit 5.

A. This is not a Hapa Haneri. May I have one of those [30] others back, please? If not, I have one of my own in my pocket, but I don't want to mix them up.

Q. I hand you back, Mr. Bauer, Exhibit 4.

A. This coin evidently had been buried and was badly corroded and then cleaned in a very bad manner so it lost all of its sharp features which a good coin should have. That is why I hesitated in the beginning. But I think that is copper all right. Yes, I think it is just mistreated. That is a real coin.

Q. Your opinion then is that the coin, for the record, that has the star on one side——

A. That is not a Hapa Haneri.

Q. That is not a Hapa Haneri?

A. That is not a Hapa Haneri. That is a twelve

(Testimony of H. E. Bauer.)

and a half cent piece. That was at the time the wage for labor, and private concerns brought them out to pay off labor, and they had to spend these coins in their stores, in the company stores, you know. That is not a Hapa Haneri. That is a twelve and a half cent piece. That was made much later than these.

Q. And the other coin in Exhibit 5 is a genuine Hapa Haneri?

A. I think so. It is just mistreated. That one lost all of the sharpness of features which a good coin should have.

Q. I show you Exhibit 6 and ask you whether you are able to determine the authenticity of that coin. [31]

A. Yes. That is a very nice one. That is in my opinion a genuine coin.

Q. A genuine Hapa Haneri? A. Yes.

Q. Mr. Bauer, are you acquainted with how many Hapa Haneri coins were issued, genuine Hapa Haneri.

A. Well, we heard before that—from the record you read, 100,000 was made or 10,000 I forget now. But, naturally, many of them got lost in fires and earthquakes and so on. So I couldn't tell how many are in existence now, you know. But they are getting very scarce now.

Q. You have handled during your period of knowledge about the coins approximately six or seven hundred?

A. Six or seven hundred Hapa Haneris.

Q. Mr. Bauer, do you know whether all Hapa



(Testimony of H. E. Bauer.)

Haneri are identical or are there differences between—

A. Well, in most large coinages, especially at that time, when they didn't have these high powered machines, you know, they made different—several dies to strike the coins, and, naturally, being made by hand, there is always a little variety and things that happen even in some modern times, modern coins, when they need new dies. It is impossible to get the same markings, and, therefore, it is either in spacing of words or in particular letters, some are a little heavier than others, and especially in this particular one, Hapa Haneri, [32] it is in the date, 1847, that the "7" is different on some than on others, you know, and also, I think, the "4." There are a few varieties, you know, and some collectors go in for those things and want the complete set, you know. But as a rule, dealers don't bother too much with them. A Hapa Haneri is a Hapa Haneri.

Q. You don't go in for those?

A. I don't go in for those things. Let the other fellow get the headaches.

Q. Can you describe for us what these variations are?

A. Well, especially, as I say, it is in the date "1847," and you may find some in there, if you compare the "7" and the "4." It is different on some of them. And also the spacing, because as I say, these dies were made by hand by engravers, you know, and they cannot get exactly the same thing all the time.



(Testimony of H. E. Bauer.)

Q. How many different variations are you aware of, Mr. Bauer?

A. Well, I know of two good ones, I mean, that can be detected easily. But some go over the things with their magnifying glasses have found four or even more variations. It all depends on the number of dies that they used. And, as I say, the records are not available. Because each die is different, will be different from the other. But I think about four is as good a guess as any. [33]

Q. These two that are readily detectable, could you describe what they are?

A. Well, if I can have them to compare, I could—it is the difference, as far as I know, it is between the “47.”

Q. I see. Let me show you Exhibit 2 and ask you whether you find any variation between the two coins in that?

A. Well, they seem to be pretty much alike. The “8” is a little—in one of them is a little lop-sided, not as in the other, you know. That may be one of the several variations that are on this coin.

Q. Anyway, that is the type of variation you are speaking of, is that correct?      A. Yes.

The Court: Handle those like you would a new phonograph record.

The Witness: Yes, because the oil of your hand leaves a spot on the coin, you know.

The Court: Yes.

Q. (By Mr. Wichman): I show you another

(Testimony of H. E. Bauer.)

coin, Mr. Bauer, and ask you whether this is a genuine Hapa Haneri?

A. Oh, no. This is a metal. I wouldn't call that a coin. It is different metal, different color, different weight, and, also, the reverse is the same as the obverse of the coin, while on other coins it is just the opposite, you know. And then I can see down here "Souvenir of Hawaii." That is [34] not a coin; that is just a fake or metal, whatever it is.

Q. That is not a genuine Hapa Haneri?

A. No, that is not.

Q. Taking Exhibit 4, you say that one of the differences is the back and the face are not reversed, is that correct?

A. Yes. Now, you see, in this coin here, if you turn it over that is upside down—that is up, and here it is upside down.

Q. You are referring to Exhibit 4 as having the face of one side being upside down in relation to the other side, is that correct?

A. The other side. And here they are both alike.

Q. In connection with the one you say is not a Hapa Haneri, the top side is the same as on the bottom side, the same on both sides?

A. That is absolutely right. I don't think that any collector can ever be fooled or any dealer can be fooled by that thing.

Mr. Wichman: Your Honor, for the record, may we have the coin just shown Mr. Bauer and identified as not being a Hapa Haneri identified for the

(Testimony of H. E. Bauer.)

record as one of respondent's coins concerning which this case involves.

The Court: Yes. It will be marked as Exhibit 7.

(The instrument referred to was marked as Exhibit 7 in evidence.) [35]

Mr. Wichman: I have no further questions for the witness.

The Court: Mr. Tuohy.

### Cross-Examination

By Mr. Tuohy:

Q. When you speak of the authenticity of a coin or the genuineness of a coin, what do you mean?

A. Well, that is—everything that you get, whether old Chinese porcelain, whatever it is, you know, there are certain facts that you know and certain descriptions that have been—come over a time, you know, and people who study that think they can tell the genuine from the fake. But as I said before, many things have been faked and some people have been duped, but as far as I know from my experience, the Hapa Haneris that I had were genuine. And I can only base it on experience. I don't know what I can tell you.

Q. In other words, you do not know whether these coins which you identified as authentic Hapa Haneri, you don't know in fact that they are genuine, do you?

A. Well, what I want to say is this: As I told you before, many things have been faked and

(Testimony of H. E. Bauer.)

copied right after they came out. And there is no saying that some wise guy may, say, in 1855, have brought out 100,000 Hapa Haneri. I couldn't swear that that didn't happen.

Q. And also you don't know whether these coins which [36] you identified as genuine Hapa Haneri, you don't know whether they were minted at the same time?

A. No. There is no way of telling that, either.

Q. In other words, you cannot testify actually as to the genuineness of the coins because you don't know; isn't that true?

A. Well, based on my experience and handling of these coins, these are the ones that I always considered to be genuine.

Q. In other words, these are the ones that you saw the most of, isn't that what you base your opinion on? A. Yes.

Q. And they could be counterfeit from the very beginning, and you would have no way of knowing that? A. That is true.

Q. Now, this coin, Mr. Bauer, Plaintiff's No. 7, I show it to you again and ask you in your mind do you think that anybody could be fooled by that coin?

A. I don't think so. Absolutely no. I mean, naturally, I suppose if a stranger came over and is Hell-bent—excuse me—he wants to get a Hapa Haneri, you know—but if he turns it over and sees on there “Souvenir”——

(Testimony of H. E. Bauer.)

Q. You mean these big letters on the bottom here?

A. Yes, I can see them. I don't need the magnifying glass. I can see that it is there. And I don't think anybody [37] can be fooled by that.

Q. Nobody would be fooled?

A. I don't think so.

Q. And, Mr. Bauer, you testified as to the value of these genuine Hapa Haneri. Now, can you tell me what the face value is? I don't mean the collector's value.

A. It is just a penny. In this particular case, the "Hapa" means "fraction," and Haneri is "a hundred." It is a fraction of a hundred. And it was at that time regarded as a penny. It is the same size as the United States large cent which was in circulation at that time, you know. The face value is just a penny.

Q. Do you know, are these in circulation? Would these be accepted in circulation? A. No, no.

Q. They are not in circulation?

A. No. In fact, since 1900 no Hawaiian coins could be passed here at all, you know.

Q. You say no Hawaiian coins could be passed?

A. No.

Q. Here since 1900?

A. No. In fact, the government called them back you know, all the dollars and so on. They melted 800,000 silver dollars out of a coinage of 1,000,000. So they don't allow them, if they turn up at the bank, because they are about the [38] same size—



(Testimony of H. E. Bauer.)

the quarters and half dollars and dimes, exactly the same size as our currency. But as soon as they turn up in the bank, they are sent back to Washington.

Q. Do you know whether any Hawaiian coins are redeemable at face by the government?

A. No, they are not redeemable.

Q. That is a flat statement, they are not redeemable?

A. Yes.

Q. With any governmental agency?

A. Yes, they will not redeem them.

Q. Are you familiar, Mr. Bauer, with the section of the United States Code that provides specifically for the redemption of Hawaiian coins by the government—by the United States government, rather?

A. No, I am not. If there was such a redemption clause, it was set for a certain time to give people in Hawaii who had Hawaiian coins a chance to turn them in. But I am sure you cannot do it now.

Q. Mr. Bauer, going back to the Hapa Haneri coin, you stated when you were being qualified here that you made an extensive study of Hawaiian coins and that you were very familiar with them, basing your statement on your study back to 1941. Can you tell the Court the extent of your studies with relation to the Hapa Haneri coin and what specific works you referred to to establish your— [39]

A. Yes. Well, I did read up—there are some books at the Hawaii section of the library which I got out. I read up on Thrum's Annual, which brought the—quite a bit about the coinage of



(Testimony of H. E. Bauer.)

Hawaiian coins. But I also had, perhaps, more experience than any other because, I told you—in fact, I bought 500 of the things at one time, and I sold 400 to one man. So I went over each one of them to pick out the ones that were good, that I wanted to keep. So I think I handled more Hapa Haneris than, perhaps, anybody here in the islands, I mean, any dealer.

Q. You mean since 1941?           A. Yes.

Mr. Tuohy: Your Honor, at this time I would like the Court to take judicial notice of its own code, and I am at a loss. I had the section of the Code with reference to redemption.

The Court: Oh, I always do that. I think you brought that up on a prior hearing.

Mr. Tuohy: I would like to inform Mr. Bauer that there is a section providing for redemption of coins.

The Witness: I don't think anybody would redeem them because they have much more value than the government will pay for them.

The Court: He is even an expert on law.

Q. (By Mr. Tuohy): Mr. Bauer, when you stated that you [40] know there were 100,000 of these Hapa Haneri coins issued, you don't know whether these coins were the ones issued, do you?

A. No. I wasn't there.

Mr. Tuohy: No further questions, your Honor.

Mr. Wichman: I have no further questions.

The Court: I would like to ask a question, Mr. Bauer. That fake coin, as you called it, on your

(Testimony of H. E. Bauer.)

direct examination you said that no collector would have been fooled with it.

The Witness: Yes.

The Court: How about an average person who might visit Hawaii and want to pick up some coins and you had a dealer who was not ethical; what are the chances of palming it off?

The Witness: Well, I think that the legend at the bottom, "Souvenir coin," condemns the coins as a coin, you know. It is just a souvenir thing, you know, and I think people, unless they have very poor eyesight, will see that, and I don't think that any dealer would dare to palm it off as the real thing.

The Court: We had a hearing on this case some time ago, and I have to use reading glasses. Without glasses, which I do not carry all the time with me, I do not see them. I notice that you have excellent eyes with the glasses you wear.

The Witness: Yes. I have sharp eyes.

The Court: You are talking now about a reputable [41] dealer. You don't think a reputable dealer would pass such a coin.

The Witness: Oh, I don't think any dealer—in fact, I think they will put up signs, "Souvenir coins of Hawaii," or something like that, and sell them for 50 cents. I don't know what the price is. But I don't think that anybody would dare put that over, because it is ridiculous, it is not a coin.

The Court: Well, there are lots of coins, paper

(Testimony of H. E. Bauer.)

bills, that come up every year that are not authentic and fool you.

The Witness: Oh, yes. But I think that little legend says quite enough. It would have been better, perhaps, if it was a little bigger. I don't know.

The Court: Are there any questions based on the Court's examination?

Mr. Wichman: No questions.

The Court: Mr. Tuohy?

Mr. Tuohy: No questions.

The Court: You are excused. Thank you, Mr. Bauer.

Mr. Wichman: We have no further evidence, your Honor.

The Court: Is there any evidence on behalf of the respondent?

Mr. Tuohy: Yes, your Honor. I would like to call Mr. Gertz to the stand. [42]

### BERNARD GERTZ

called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Tuohy:

Q. Will you please state your name?

A. Bernard Bertz.

Q. Mr. Gertz, what is your occupation?

A. Wholesale merchant, primarily in the souvenir business.

Q. Pardon?

(Testimony of Bernard Gertz.)

A. Primarily in the souvenir business.

Q. Do you work for anyone or are you self-employed?      A. Self-employed.

Q. Mr. Gertz, I would like to ask you at this time to tell the Court all of the circumstances attendant upon you bringing into the Territory of Hawaii these souvenir coins.

Mr. Wichman: Just a minute. I will object to that, incompetent, irrelevant and immaterial and completely beyond the issues that are presented to the Court by the stipulation and the libel of information. There is nothing pertinent or relevant in how the coins got here. It is the existence and the possession of them that is the offense, and all of that is already stipulated as evidence. The only two issues before the Court are as brought forth in the stipulation of facts.

Mr. Tuohy: If your Honor please, I want to bring out [43] to the Court the intent of the party when he brought the coins in here. I think that is one of the primary issues involved. There is no stipulation as to his intention.

The Court: I don't think that is relevant, Mr. Tuohy. The only questions before the Court are whether or not the respondent coins are likenesses of the 1847 Hapa Haneri, and whether the Hapa Haneri was issued as money by the Hawaiian Government.

Mr. Tuohy: If your Honor please, this libel of information was based on a violation of Section 489 of Title 18, U. S. Code, which section governs

(Testimony of Bernard Gertz.)

counterfeiting. I don't want to get into our argument again that we had on our motion to dismiss, but I am going on the assumption that the counterfeiting is involved, and one of the major requisites of the offense of counterfeiting is intent to deceive. I think that Mr. Gertz should be given the opportunity to be heard. Apparently, we are on a different basis again as to which section governs. I fully realize this is a civil procedure, but it is brought under the counterfeiting section of the criminal code.

Mr. Wichman: Your Honor, if I may be heard on that, it is not accurate to say that a proceeding is brought under the counterfeiting section in that it is brought under Section 489. The counterfeiting of coins is governed—Gold and silver coins or bars is governed by Section 485, the uttering of those coins by 486, the dies and possessing dies 487 and [44] 488; you get to 489 and it is making or possessing of likenesses of coins, and that is the section. If the Court will look into the cases governing those coins that are in no way likely to deceive the public that they are genuine coins—in fact, there is one case in which the Court will recall where on one side it says, “The So and So Company,” some private enterprise, and had the face of the coin on the other side, and what it does is make the possession of coins which are likenesses or similitude as to design, color, or inscription of any other coin an offense. So that so far as any intent is concerned, we have that stipulated in the stipulation of facts in



(Testimony of Bernard Gertz.)

Paragraph 3 in that he had these coins in his possession with intent to sell, give away and otherwise use. That is the only intent pertinent here.

The Court: That is the only intent I am concerned with now. I think you might by direct questioning, if you want to, ask the witness about the design of the respondent coins and that sort of thing. I will listen to that, but not what his intention was to do with them. What directions he gave and that sort of thing isn't really too pertinent, but I will listen to that testimony, because this is not counterfeiting. We are not dealing with counterfeiting at all. Proceed with your questioning, and if Mr. Wichman objects, I will rule on the objections. There is nothing before the Court.

Mr. Wichman. Your Honor, I may be able to shorten [45] it, possibly, by offering to stipulate that Mr. Gertz did not have any intention to defraud the public or pass these coins as genuine. There is no such contention on the part of the government. If that is what the questions are aimed at, we are willing to stipulate that he had no such intention to defraud the government and pass them as coins.

Mr. Tuohy: We will accept the stipulation.

The Court: Very well. The stipulation is approved.

Q. (By Mr. Tuohy): Just one question to Mr. Gertz: Could you tell us what instructions or directions you gave in the minting of these coins, and I show you one marked Prosecution's Exhibit—I



(Testimony of Bernard Gertz.)

mean Plaintiff's Exhibit No. 7. What instructions did you give to change the design on this coin that was sent back to reproduce?

A. We requested that they use a golding metal so it wouldn't be confused, the faces being reversed, and also the word "Souvenir" being put on the bottom; also, there is "Alii of Hawaii," and that is a trade-mark on the back of it.

Mr. Tuohy: No further questions, your Honor.

Mr. Wichman: I have one.

### Cross-Examination

By Mr. Wichman:

Q. Referring to Exhibit 7, Mr. Gertz, the coin you sent back to have—let me withdraw that. What company did you send this coin back to that you referred to? [46]

A. Osborne Coinage Company.

Q. Where are they located?

A. Ohio, I believe.

Q. What type of coin did you send back?

A. I sent the original.

Q. You sent back an original Hapa Haneri coin?

A. That is correct.

Q. Similar in all respects to Exhibits 2, 3, 4, 5 and 6?

Mr. Tuohy: Your Honor, I object to that question. The witness hasn't even had the opportunity to see those exhibits, and, also, he is not qualified to answer that type of question.

(Testimony of Bernard Gertz.)

The Court: The objection is overruled.

Mr. Tuohy: Would you like to see the exhibits or——

The Witness: Yes, please, if you don't mind.

Mr. Wichman: Let me withdraw that question and ask it this way:

Q. Showing you Exhibit 2, would you look at the coins in here and tell me whether they are similar, as best you can tell, to the one you sent back to the company, Osborne Company?

A. Yes, I would say they were similar.

Q. Speak louder, please.

A. I would say they were similar.

Q. And you gave the company instructions to duplicate that coin with certain variations, is that correct? [47]

A. Not to duplicate it, if I may put it that way.

Q. To do what with it?

A. To make a pocket piece using similar faces but reversing them as instructed.

Q. Showing you the two genuine Hapa Haneri and Exhibit 7, which is one of the respondent coins; what are the variations or what are the differences between those coins?

A. Just the additional wording on the back of it.

The Court: I can't hear you.

The Witness: Just the additional wording on the back, "Souvenir, Alii of Hawaii." You also have a thickness variation, slightly narrower, thinner coin.

Q. (By Mr. Wichman): That is, Exhibit 7 is

(Testimony of Bernard Gertz.)

slightly narrower, but the wreath is in all respects identical, isn't it?

A. I would say it is very close.

Q. Well, you don't think it is identical?

A. Well, as Mr. Bauer would say, you have got a different fellow cutting the die. It is meant to be very close.

Q. Where do you see any variation?

A. I would say the leaves don't look quite as long on the wreath.

Q. On which exhibit?           A. On 7.

Q. 7? [48]

A. Is that it? The leaves don't look as long.

Q. How about the lettering "Hapa Haneri"; do you see any difference there?

A. They are very similar.

Q. And "Aupuni Hawaii"?

A. Might be a little difference in the size of the print used, but very similar.

Q. Referring to the face that says, "Kamehameha III, Ka Moi," do you see any difference there?

A. Well, your color factor, again, is different.

Q. Outside of that, they are very similar?

A. Very similar.

Q. They carry the same wording and same type of portrait and the same date?           A. Right.

Mr. Wichman: Could I have a moment, your Honor?

The Court: Yes.

Mr. Wichman: I have no further questions.

Mr. Tuohy: I have no further questions.

The Court: You may step down, Mr. Gertz.

Mr. Tuohy: We have no further witnesses, your Honor.

The Court: Is there any rebuttal?

Mr. Wichman: We have no further evidence, your Honor. But at this time I would like to request permission of the Court to substitute a photograph of Exhibit 2 in evidence, [49] the photograph being the face of one of the coins and the reverse side of one of the coins, and ask permission of the Court to withdraw Exhibit 2, and also permission to withdraw Exhibits 3, 4, 5 and 6, to be returned to the custody of the Bishop Museum. I make that request without submitting photographs in that it is the testimony that each of these is kept separate to show which acquisition is which, and if at any time in the future they need to be recalled, we have sufficient identification in Exhibit 1 to identify exactly which coins we wish to have returned, and I don't like to ask the Bishop Museum to allow us to keep out of their possession items of historical value, such as this, and there is sufficient basis for comparison by the Court in the photograph that we have offered in substitution for Exhibit 2. I don't know whether counsel has any objection.

Mr. Tuohy; No, we have no objection to that.

The Court: Yes, that may be done and the clerk may return the coins from the Bishop Museum to Mrs. Hohu, who is still in court, and the photograph will be received in lieu of those exhibits for the time being.

I would like to have brief arguments from counsel

on this matter. It is a unique situation. Are you free at 10:00 o'clock Monday morning, Mr. Tuohy?

Mr. Tuohy: Yes, your Honor.

The Court: I have a matter that was set down, but [50] it is going to be continued. I think it would be better to have the argument, then. It shouldn't take too long. Are you available at that time, Mr. Wichman?

Mr. Wichman: That is agreeable, your Honor.

(An adjournment was here taken in this [51] matter.)

I, Elbert Cripps, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of proceedings in Civil No. 1474, United States of America, Libelant, vs. 3,827 Coins, etc., Respondent, held in the above-named court on September 14, 1956, before the Hon. Jon Wiig.

March 8, 1957.

/s/ ELBERT CRIPPS.

[Endorsed]: Filed March 13, 1957.



[Title of District Court and Cause.]

## ORAL DECISION

Before: Hon. Jon Wiig, Judge.

September 17, 1956.

I have been unable to find any case directly in point or even analogous to the situation presented by the libel of information and the proof in support of it. At the outset it is necessary to note that this is a libel of information, a civil action, and not a criminal action, although it does include by reference the provisions of Section 489 of Title 18, which is a petty offense carrying a maximum punishment of \$100, whereas most of the counterfeiting sections carry punishments of many thousand dollars and up to fifteen years in prison. And it being a civil action for forfeiture, it still has to be strictly construed as against the respondent. However, I feel that the proof offered on behalf of the libellant is adequate to support the allegations. This is partly covered by stipulation of facts between the counsel for the government and the libellant, leaving for determination the question whether or not the respondent tokens are likenesses of the 1847 hapa haneri coin issued by the Hawaiian government.

I have had an opportunity to examine coins, genuine coins, and I believe them to be genuine on the basis of the evidence and of the testimony of Mr. Bauer. There is no testimony to the contrary. Also the testimony of Mr. Gertz on behalf of the



respondent was to the effect that he had sent a genuine 1847 hapa haneri, or at least he thought it was genuine, to the manufacturer of these discs with directions to make them the same with three exceptions, that the two sides were to be reversed, that is, going up and down on the coin. That direction was carried out. Also, they were to be a little thinner. That direction was carried out. And to imprint on the disc the words "Souvenir, Alii of Hawaii." That was done. I examined the coins or the discs and the genuine coins at the hearing on the motion to dismiss, although my eyes are not too bad, I was unable to pick out those four words without using my glasses and examining the coins very carefully. The one I now have in my hand, having been knocked about during the course of the trial, the color is starting to get in places like some of the genuine coins. How long those words would hold up, I do not know, that is, the words "Souvenir, Alii of [2\*] Hawaii," which are extremely small. The photograph of the genuine coin shows a marked likeness, practically complete likeness to the faces of the respondent coins.

I am aware of Mr. Bauer's testimony when he first said this, that any collector would not be fooled by the respondent coins. On cross-examination he said that he didn't think anybody would be fooled. Mr. Bauer was a very precise and discerning witness who was primarily interested in the authenticity of coins. He referred to this respondent coin at the outset as a fake and put it down on the rail there as though he did not even want to handle it.

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**\*Page numbering appearing at top of page of original Reporter's Transcript of Record.**

I do not feel that I am bound by his testimony to the effect that nobody would be fooled by this coin. As a matter of fact, when I asked him some questions, he was even hesitating in admitting that there might be such a person as an unscrupulous coin dealer. I think he is a very ethical man himself and he couldn't even think of anyone who would attempt to palm one of the respondent coins off on a purchaser.

I am satisfied, therefore, that the respondent coins are likenesses or similitudes of the 1847 hapa haneri coins issued by the Hawaiian government.

Then we come to the remaining question, that the 1847 hapa haneri coin was issued as money by the Hawaiian government and whether that government was a foreign country within the meaning of Section 489, and also whether it was issued as [3] money. The proof put forward by the government in that respect, I think, again is satisfactory. The Hawaiian government was a kingdom in 1847 and was a foreign country. Also the proof shows that under the statute of Kamehameha III on April 27, 1846, authority was given to issue coins such as the hapa haneri and that they were issued. In this respect there is absolutely no testimony to the contrary. I am mindful of the argument of counsel for the respondent coins that the Hawaiian government is no longer a foreign country because of the merger. If this were a criminal case, it might present a grave problem, but I don't think it would in view of the general terms of the statute. The coins were issued as money by the Hawaiian government at the

time when it was a foreign country. And I know of no reason why the merger would or could affect that as a question of fact at the time of the issuance of coins. I accepted the stipulation of counsel that Mr. Gertz had no evil intent to defraud, although that is not an issue in this case.

On the basis of the findings of the Court and the stipulations of counsel, I find that the libelant is entitled to forfeiture, and the Court will decree for forfeiture to the United States of the respondent coins and their subsequent disposition pursuant to law.

Mr. Tuohy, whether you and your associate feel there is any possibility of seeking a remission of the forfeiture by [4] application to the Secretary of the Treasury, I don't know. But that is provided for in the statute and if you are to make such an application I will not dispose of it or not order disposal of the respondent coins until you have had an opportunity to make such an application.

March 13, 1957.

/s/ ALBERT GRAIN,  
Official Court Reporter.

[Endorsed]: Filed March 13, 1957. [5]

In the United States District Court for the  
District of Hawaii

Civil 1474

UNITED STATES OF AMERICA,

Libelant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa  
Haneri" Issued by the Hawaiian Government,

Respondent.

ORAL DECISION ON MOTION  
TO RECONSIDER

Before Hon. Jon Wiig, Judge.

October 3, 1956.

I appreciate your argument, Mr. Wichman, but I still think that I was wrong when I ruled on the case from the bench before, and I will rescind that ruling and set it aside. I have prepared a draft of an opinion in this case which I am prepared to read into the record, in view of the fact that the memorandum and argument of Mr. Wichman had not convinced me that I was right the first time. My draft reads as follows:

The United States of America as libelant filed a libel of information under the provisions of 18 U.S.C.A., Section 492, against 3,827 Coins, "being likenesses of the 1847 hapa haneri issued by the Hawaiian government," the possession of which it



was alleged violated 18 U.S.C.A., Section 489. The first note under that, I quote the section in toto with the exception of the punishment, Section 489. The libel prayed for forfeiture of the coins and their disposition pursuant to law.

In February, 1956, a special agent of the United States Secret Service field force seized the respondent's coins, claimed them forfeited in violation of the section cited above. The coins were in the possession of Bernard Gertz, who was responsible for their manufacture and who intended to sell them as souvenirs. The Court accepted a stipulation that Mr. Gertz had no intention to defraud or cheat any prospective purchasers, although that is not an issue in the case.

Respondent Coins resemble very closely the hapa haneri copper penny issued by the Kingdom of Hawaii in 1847. They were in fact so intended and so ordered, with certain slight variations which are a different metal, as used in the respondent's coins, and they are slightly thinner than the genuine coins. The facings on the respondent coins are reversed from the hapa haneri, that is, when turning the coins over the reverse side of the respondent coins will appear upside down and on the respondent coins in print so minute as to remain unseen without careful examination are the words "Souvenir, Alii of Hawaii."

The evidence is convincing that the respondent coins are likenesses or similitudes of the 1847 hapa haneri. The evidence showed that the hapa haneri

coin was issued as money by the Kingdom of Hawaii in 1847.

The second act of Kamehameha III entitled, "An Act to Organize the Executive Department of the Hawaiian Islands," enacted April 27, 1846, authorized the issuance of coins such as the hapa haneri. The coins were minted the following year and placed in circulation as genuine money of the kingdom.

Counsel for the respondent coins urged that the coins are not within the proscription of Section 489 because the Kingdom of Hawaii is not now a foreign government or country within the meaning of the statute. Or to put it another way, that Section 489 may only be construed to apply to an "existing" foreign country or government. The Assistant United States Attorney contends on behalf of libelant that the statute is broad in its terms and that any coin "issued as money under the authority of any foreign government" necessarily includes the respondent coins.

The Court takes judicial notice of the following historical facts: On October 8, 1840, the first constitution of the Kingdom of Hawaii was proclaimed by King Kamehameha III. Following the lead of the United States of America, France and Great Britain in November, 1843, united in a joint declaration recognizing the independence of Hawaii. Her status as a sovereign nation continued until the annexation of the Republic of Hawaii to the United States of America by virtue of a joint resolution adopted on July 8, 1898. In April, 1900, Con-



gress enacted the Hawaiian Organic Act which established a territorial form of government in Hawaii, a statute which has remained unchanged since that date.

An early case, *United States against Arjona*, 120 U.S. 479 (1887), points up the need for and validity of laws of the United States which protect the integrity of money, notes or other securities issued by or under the authority of foreign sovereign governments. The rationale of that case, coupled with the definition of "foreign government," found in 18 U.S.C.A., Section 11—and that section is cited as a note after 11—leads to the conclusion that the respondent coins were not issued as money under the authority of a foreign government contrary to the provisions of Section 489. Because of the chain of historical events summarized above the Kingdom of Hawaii cannot possibly be considered as a "foreign government" in the year 1956. It no longer exists.

After long courtship—and there is a note there in which I cite from page 7 of the Revised Laws of Hawaii, 1935, a portion of Act 86 of the Session Laws of Hawaii, 1923—so going back, after a long courtship the engagement was announced in 1898, followed by the wedding in 1900, which forever ended the existence of a proud and noble sovereign nation whose place in the nations of the world had been completely recognized by all other foreign governments up to the date of the final ceremony. I might give you that quote for the record:

"The annexation of Hawaii was first formally

considered between the government of Hawaii and of the United States in 1853-4. At that time President Pierce of the United States instructed Secretary of State Marcy to commission V. L. Gregg to represent the United States in Hawaii to negotiate with Kamehameha III, King of Hawaii, for the annexation of Hawaii to the United States. The treaty was negotiated upon the basis of Hawaii coming into the Union as a state 'enjoying the same degree of sovereignty as other states and admitted as such to all the rights, privileges and immunities of a state, on a perfect equality with other states of the Union.' "

And in that connection see the records of the United States State Department and Downes against Bidwell, 182 U.S. 245 at 305.

The libel of information is dismissed and the respondent coins will be returned to their owner.

March 13, 1957.

/s/ ALBERT GRAIN,  
Official Court Reporter.

[Endorsed]: Filed March 13, 1957.

[Title of District Court and Cause.]

DOCKET ENTRIES

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Mar. 28—Libel of Information filed. Warrant of Seizure and Monition issued, certifying two copies of Warrant and Libel for service. Marshal's returns to monition filed, served.

Apr. 16—Stipulation for extension of time, filed 5-16-56.

May 15—Motion to Dismiss and Citation of Authorities and Notice of Hearing filed.

May 23—Entering proceedings at hearing on motion to dismiss, arguments by Rodrigues and Tuohy for defense, argument by Wichman, closing argument by Tuohy, Motion to Dismiss denied, allowed 1 week to file pleading, etc.

May 31—Answer filed.

Aug. 8—Stipulation of Facts filed.

Sept. 12—Civil subpoena to produce, etc., issued with copy for service. Marshal's returns to subpoena filed (served).

Sept. 14—Entering proceedings called for trial. Statement by Tuohy and Wichman as to stipulation, etc. Witnesses: Plaintiff—Eugene Chang, Mrs. Clarence Hohn, Hugo E. Bauer. Exhibits: Plaintiff—Nos. 1, 2, 3, 4, 5, 6 and 7 admitted. 11:37 a.m. Plaintiff rests. Witness: Respondent—Bernard Gertz. 11:50 a.m. Respondent

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rests. Photo of Plaintiff's Exhibit No. 2 substituted and Exhibits 2, 3, 4, 5 and 6 returned to Mrs. Hohu for Bishop Museum. Court will require arguments. Continued to 10:00 a.m. September 17, 1956, for arguments.

Sept. 17—Entering proceedings at further trial. Opening argument by Wichman. 10:13 a.m. argument by Tuohy. 10:33 a.m. closing argument by Wichman. Oral Ruling by Court. Findings and Stipulation. Libelant entitled to forfeiture of respondents. Decree of Forfeiture to enter and Disposal by Authorities, etc.

Oct. 2—Memorandum in response to motion for reconsideration filed. Form of Judgment and Order of Forfeiture submitted (Plaintiff).

Oct. 3—Entering proceedings at hearing on Court's reconsideration of former ruling. Remarks by Court. Statement by Wichman. Court will rescind ruling and set same aside. Decision read into record. Libel of Information ordered dismissed. Coins to be returned to claimant. Request, Wichman. Coins to be retained until further order of Court. Decision filed. Wiig.

Oct. 16—Form of Judgment and Order Returning Seized Property to Owners submitted. Copy delivered to U. S. Attorney's office.

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- Oct. 19—Statement suggesting revision of draft of judgment submitted by claimant filed.
- Nov. 1—Judgment and Order Returning Seized Property to Owner filed. Judgment entered in favor of respondent on November 1, 1956, at 3:30 p.m. Information dismissed. Wiig. Coins will be returned to their owner. Counsel advised by mail as to entry of judgment, etc.
- Dec. 31—Notice of Appeal filed. Counsel for respondent advised by letter.

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- Feb. 6—Order extending time for filing record and docketing appeal filed. McLaughlin.
- Feb. 28—Designation of Record on Appeal filed.
- Mar. 6—Order Extending Time for Filing Record and Docketing Appeal filed.
- Mar. 12—Supplemental Designation of Record on Appeal filed.
- Mar. 13—Transcripts of Proceedings May 23, 1956; September 14, 1956; September 17, 1956, and October 3, 1956 filed.



[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Hawaii—ss.

I, Thomas P. Cummins, Deputy Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from Page 1 to Page 105, consists of a statement of the names and addresses of the attorneys of record, the various pleadings, exhibits and transcript of proceedings as hereinbelow listed and indicated:

Libel of Information.

Return of Service of Writ.

Public Notice of Attachment.

Warrant of Seizure and Monition.

Stipulation for Extension of Time.

Motion to Dismiss, Citation of Authorities and Notice of Hearing.

Answer.

Stipulation of Facts.

Decision.

Judgment and Order Returning Seized Property to Owner.

Notice of Appeal.

Order Extending Time for Filing Record and Docketing Appeal (February 6, 1957).

Designation of Record on Appeal.

Order Extending Time for Filing Record and Docketing Appeal (March 6, 1957).



Supplemental Designation of Record on Appeal.  
Exhibits "1," "2" (Photographic copy), & "7."  
Transcript of Proceedings.

I further certify that included in said record on appeal is a copy of the Docket Entries.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 15th day of March, 1957.

[Seal]      /s/ THOS. P. CUMMINS,  
Deputy Clerk, United States District Court, District of Hawaii.

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[Endorsed]: No. 15485. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Barney A. Gertz, Owner of 3,827 Coins, Being Likenesses of the 1847 "Hapa Haneri" Issued by the Hawaiian Government, Appellee. Transcript of Record, Appeal From the United States District Court for the District of Hawaii.

Filed March 19, 1957.

      /s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 15485

UNITED STATES OF AMERICA,

Appellant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa  
Haneri" Issued by the Hawaiian Government,  
Appellee.

STATEMENT OF POINTS UPON WHICH AP-  
PELLANT INTENDS TO RELY ON AP-  
PEAL

Appellant herein, pursuant to Rule 75 (d) of the Federal Rules of Civil Procedure, hereby states the points upon which it intends to rely on appeal:

1. The trial court erred in finding respondent coins do not come within the provision of Title 18, United States Code, § 489.

2. The trial court erred in not finding Kingdom of Hawaii was a "foreign government" within the purview of Title 18. United States Code, § 489.

Dated: Honolulu, T. H., this 15th day of March, 1957.

LOUIS B. BLISSARD,

United States Attorney, District of Hawaii, At-  
torney for Appellant,

By /s/ CHARLES R. WICHMAN,

Asst. United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed March 20, 1957.